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No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1957

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. (I. G. CHEMIE), ETC., PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND IVY BAKER PRIEST, TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

A previous petition for a writ of certiorari has been denied in this case. 350 U. S. 937. The principal opinions of the courts below, rendered prior thereto, are reported at 111 F. Supp. 435, 15 F. R. D. 83, and 225 F. 2d 532.

Following the denial of certiorari, the district court delivered an unreported opinion from the bench. (R.

1998–2000.)[1] The opinion of the court of appeals is reported at 243 F. 2d 254.

JURISDICTION

The judgment of the court of appeals which is the subject of the present petition for a writ of certiorari was entered on April 11, 1957. (R. 2037.) A petition for rehearing *en banc* was denied on May 10, 1957. (R. 2050.) This petition was filed on August 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the courts below abused their discretion in refusing to extend further the period of grace granted by the court of appeals in June 1955 for compliance with a 1949 district court order for the production of petitioner's documents and books and those of its closely affiliated and controlled private bank, when it was found, at the expiration of many extensions, that petitioner had not fully produced the required documents and had produced none of the books of its affiliated private bank, and that there was no assurance that the missing papers and books would be produced, even if the time were further extended.

STATUTE INVOLVED

The pertinent provisions of the Trading with the Enemy Act are set out in the Appendix, *infra*, pp. 14–15.

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[1] Respondents will follow petitioner's method of referring to the printed record simply as "R". R. 1 to R. 1918 constitute the printed record which was before this Court in No. 500, October Term, 1955. R. 1919 to R. 2053 relate to proceedings following the denial of certiorari on January 9, 1956.

STATEMENT

Proceedings culminating in the denial of certiorari, 350 U. S. 937 (No. 500, October Term, 1955).[2]—In October 1948, petitioner, a Swiss holding company, also known as I. G. Chemie or Interhandel, brought suit against the respondents in the United States District Court for the District of Columbia to recover some 93% of the stock of General Aniline & Film Corporation, a Delaware corporation. The property had been vested under the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*) by vesting orders reciting that it was property of foreign nationals or owned by or held for I. G. Farbenindustrie A. G., of Germany.

In July 1949, the district court issued a broad order requiring mutual production by both parties. In addition to its own papers, petitioner was ordered to produce the records of H. Sturzenegger & Cie., a private bank found to be closely affiliated with, and under the control of, petitioner. (R. 339, 335, 612-613, 615; 225 F. 2d 532, 537.) Respondents complied fully with the court's order, but the Swiss Federal Attorney, in June 1950, took "constructive custody" of the Sturzenegger records to prevent their production, stating that inspection by respondents would violate Swiss secrecy laws. (R. 719.) In February 1953, the district court ruled that the complaint would be dismissed within a specified time unless petitioner produced the Sturzenegger records. After receiving seven

[2] For details of the proceedings, see respondents' brief in opposition to the petition for certiorari in No. 500, October Term 1955, pp. 3–15, referred to as "No. 500."

additional months in which to comply, petitioner offered some 63,000 documents which had been released pursuant to a procedure of individual waivers by customers and clearances from the Swiss Federal Attorney. No disclosure of the Sturzenegger books was made. Instead, petitioner was considering a plan whereby photostatic excerpts from the books would be shown. (R. 668, 118–119, 137–138.) The district court, on December 21, 1953, entered an order dismissing the complaint on the ground that, despite four years of elapsed time, there was still no reasonable likelihood that petitioner could make the required full production. (R. 679, 672.) The court of appeals affirmed. 225 F. 2d 532. However, it modified the order of dismissal by providing that it should be vacated if full production were made within six months after receipt of the mandate by the district court. (R. 1940.) A petition for rehearing *en banc* was denied on September 1, 1955.

In its petition for a writ of certiorari in No. 500, October Term, 1955, petitioner attacked the finding of the lower courts that it had control of the Sturzenegger records; it asserted, also, that dismissal because of its "involuntary" inability to produce violated the constitutional guaranty of due process, and that the district court should have required respondents to examine the 63,000 documents tendered by petitioner to determine whether there was good cause for the production of more. (Pet. in No. 500, pp. 3–4, 16, 17–19, 22, 26–28.) Respondents, in their

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A chronology of events following the production order of July 5, 1949 appears at R. 1970–1972.

brief in opposition (Br. 15, n. 8), urged that, despite the inclusion of the six months' proviso by the court of appeals, the petition should be considered on its merits because the issues decided were fundamental to the further conduct of the case. Certiorari was denied. 350 U. S. 937. In its petition for rehearing (p. 3), petitioner requested the Court to retain jurisdiction over the application for certiorari on the ground that this was the only method by which the Court could later review the decisions of the lower courts if, after expiration of the six months' period without compliance with the discovery order, the dismissal should become "final in every sense of the word." The petition for rehearing was denied. 350 U. S. 976.

Proceedings following the denial of certiorari:— The mandate of the court of appeals was received by the district court on January 24, 1956, and the six months' period of grace expired on July 23, 1956. During July 1956, the district court denied petitioner's motions for an unspecified extension of the six months' period. (R. 1935, 1980.) In support of its motions, petitioner asserted that 192,000 Sturzenegger documents had now been released pursuant to waivers by customers of the Sturzenegger firm. (R. 1925, 1936, 1945.)[4] It also submitted a plan, approved by the Swiss Government, under which a

[4] Petitioner's affidavits listing the persons and corporations to whom the documents related failed to include the names of more than half a hundred individuals and corporations (many of whom are German or Farben-connected) which had accounts and substantial transactions with Sturzenegger. (R. 1969–1973.)

"neutral person" pledged to secrecy would be appointed. The "neutral" would have to be approved by the court, the parties, and the Swiss Cabinet and would be sworn to secrecy in accordance with Swiss concepts, in a manner to be agreed on with the Swiss Federal Attorney. The "neutral", who would examine the unproduced materials (documents and records of the Sturzenegger Bank for which no waivers had been obtained) would be required to keep secret the facts coming to his attention. He would determine which of the documents, entries, and accounts were relevant, and an attempt would then be made to secure, by letters rogatory, the production of the items found relevant by him. Petitioner would undertake to obtain official authorization for respondents to examine the books on Swiss soil, an act otherwise prohibited by the Swiss Criminal Code. (R. 1951–1955.) The district court (Chief Judge Laws) found that, more than seven years after the issuance of the original production order, there still was no assurance whatever that the papers would be produced; that a party cannot be required to resort to letters rogatory to inspect papers under the control of the opposing party; that, under the laws of the United States, there is no provision for a neutral to take the place of the court and to decide which papers are relevant and which are not; that nothing short of full production of the papers would constitute compliance; and that, under the circumstances, any extension would be a futile act. (R. 1998–2000.) Petitioner immediately moved in the court of appeals for an extension pending appeal, but that court refused to

extend the time beyond July 30, 1956. (R. 2018.) A petition for rehearing was denied by the panel and by the whole bench.

Thereupon, in August 1956, the district court, finding that there had been no compliance with the discovery order on or before July 30, 1956, entered an order upon the mandate of the court of appeals and denied a motion to vacate the order upon the mandate. (R. 2017, 2026.) The court of appeals affirmed these orders of the district court. (R. 2037.) [5]

ARGUMENT

1. More than two years ago, the court of appeals, considering petitioner's failure to satisfy the terms of a production order issued in 1949, concluded that the litigation risk arising from non-production "need not be cast upon a defendant when a plaintiff by action of its own government is disabled from complying with discovery rules applicable generally to litigants under the law of the forum" (225 F. 2d at 540). Petitioner sought review of that decision, filing an extended petition (October Term, 1955, No. 500). The Government opposed certiorari, filing a brief of some thirty-five pages in order to give a full history of the controversy and to treat fully the various legal contentions advanced. We argued that the district court had followed proper procedures in making its

[5] Pending the appeal, in October 1956, the Swiss Government revoked the seizure order on the ground that by the entry of the order on the mandate the suit had been dismissed. However, it reserved the right to renew similar measures, if necessary. (R. 2033.) Petitioner has stated that this revocation has not brought about any change in the situation. (R. 2029.)

original determination (at the conclusion of ten days of hearings) that petitioner had control of the Sturzenegger Bank and should therefore be directed to make available the designated books and records of the Bank (books and records which are concededly relevant to the merits of petitioner's suit and are, quite possibly, crucial); that, whatever impediments to production may have been interposed by Swiss law or by Swiss authorities, petitioner, seeking to avail itself of the processes of our courts, is governed by the *lex fori* and may be required, upon pain of default of its claim, to permit the defending litigant access to all of the underlying facts; and that dismissal of the suit, for non-compliance with the discovery order, was authorized and proper.[6] This Court, fully advised as to the issues, denied certiorari (350 U. S. 937) and subsequently denied a petition for rehearing (350 U. S. 976).

With the exception of its suggestion that it has now advanced a new plan which would satisfy the purposes of the district court's original discovery order (Pet. 21–23), the petition is devoted to the very same arguments which were advanced in the prior petition (No. 500). As to these contentions, already repeatedly and unsuccessfully presented to the lower courts and to this Court, we respectfully refer the Court to

[6] Contrary to petitioner's contention (Pet. 19), the courts below recognized that they had discretion whether or not to dismiss the complaint. The penultimate paragraph of the court of appeals' opinion weighed the various considerations which entered into the exercise of that discretion. 225 F. 2d at 542.

our brief in opposition filed in the 1955 Term (No. 500).[7]

2. The courts below acted within their sound judicial discretion when they refused to extend the time for production and to vacate the order of dismissal entered upon the mandate of the court of appeals. As in 1953, when the district court entered its original dismissal order, there is still no compliance with the discovery order.[8] (R. 2018.) At that time, the method of individual waivers by the bank's customers and clearances by the Swiss Federal Attorney had yielded a substantial number, but not all, of the Sturzenegger documents, and petitioner was considering a plan to furnish photostatic copies of excerpts from the books of account which had been cleared by individual waivers. Now, the number of documents yielded by the same method has increased but still does not include all of those ordered to be produced.[9] In short,

[7] The objections to dismissal, phrased in the earlier petition in "due process" terms, are now cast in terms of an asserted "denial of jurisdiction". But, obviously, jurisdiction to determine the validity of the Trading with the Enemy Act seizure was not denied by the courts below. Rather, they determined that a plaintiff who does not comply with a valid court order which is fundamental to the fair conduct of the litigation cannot be permitted to continue the prosecution of his case.

[8] The fact of non-compliance at the expiration of the six months' period of grace is reflected in petitioner's own efforts to secure further extensions.

[9] Although petitioner now seeks to create the impression that it had tendered the entire 110 books of account of the Sturzenegger Bank (Pet. 20, n. 17), there was no tender worthy of the name. The books were "offered" to the extent of the portions thereof which might be determined to be relevant by a neutral, in accordance with petitioner's newly proposed plan. See *supra*, pp. 5–6.

there is no more assurance now than in 1953 that full production would be made. The principal difference is that considerably more time has passed—almost four years have expired since the earlier order of dismissal.

Petitioner now proposes that a neutral person approved by the Swiss Cabinet and pledged to Swiss secrecy should examine the missing Sturzenegger papers and books [10] and should determine, in his uncontrolled discretion, what items are relevant.[11] Then, there would be an attempt to secure, by letters rogatory, the production of the material found relevant by him. See *supra*, p. 6. But with the exception of the plan for the appointment of a "neutral person", the same method which was used before the dismissal is still being applied, with the same defects and objections. We respectfully refer to our brief in No. 500, pp. 26–29, where it was pointed out that both courts had found a full, not a partial and selective, examination of the Sturzenegger papers to be vital,[12] and that

[10] The court of appeals stressed the importance of the Sturzenegger books when it quoted the statement in the district court's opinion that the "banking records of the transactions of a corporation are among the best possible indicia of its ownership and control." 225 F. 2d at 537.

[11] Petitioner has frequently conceded the general relevancy of the records of its house bank, Sturzenegger. (Pet. 10, n. 8; R. 615; 225 F. 2d at 537; unprinted record in court of appeals' No. 12140, pp. 1165–1166, 1042, 163–164, which is part of the record in this proceeding.)

[12] Chief Judge Laws has since reaffirmed his finding that full production is essential. He has ruled that the documents now offered by petitioner are not all which the Swiss Compensation Office has inspected and has reiterated that his order required production of all such records. (R. 2002.)

the method of individual waivers, with the right of refusal in the Swiss Federal Attorney, is unacceptable as a process of discovery under our system of law.

The courts below properly held that the new element—the appointment of a "neutral person"—would be inconsistent with our judicial standards and inadequate to protect the rights of respondents. (R. 1999, 2039). Certainly, there can be no delegation of the power to determine relevancy to one who is pledged to secrecy even against the court and is free from its control.[13] Cf. *Schwimmer* v. *United States*, 232 F. 2d 855, 865 (C. A. 8), certiorari denied, 352 U. S. 833. Adoption of this proposal would mean an abdication of judicial functions; the Swiss Cabinet would acquire the power to veto the selection of a person, approved by the court, to whom a crucial judicial function would be delegated; and by binding the "neutral" to Swiss secrecy regarding the results of his inspection (even as against the district court) there would be reintroduced into the case, by a back door, the very secrecy laws which, as we have previously argued, cannot be permitted to obstruct discovery under American principles of law. See our brief in No.

[13] Petitioner cites the case of *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corporation*, 16 F. R. D. 513 (S. D. N. Y.), as authority for the appointment of "independent investigators" to protect the parties from oppression. (Pet. 22.) But none of the elements outlined above—veto power of the foreign Government, secrecy standards under foreign law, and secrecy even against the court—was present in that case. Moreover, there, in a case having a narrowly limited issue, a competitor was prevented from learning irrelevant business secrets and customers' names. Here, all the records were found by both courts to be relevant and were ordered to be produced.

500, pp. 21–26. Moreover, under the plan, respondents would be deprived of the absolute right to inspection by their own counsel, particularly important in a complex case like the present one where "cloaking" and "enemy taint" are the ultimate issues. See *id.*, pp. 27–28, n. 19. Nor would the plan offer any assurance of full production even of the entries and documents which the "neutral" should determine to be relevant, because thereafter another process, that of letters rogatory, would have to be initiated, with all the delays and uncertainties inherent in that procedure.[14] Finally, an authorization would then have to be obtained from the Swiss Government to inspect the book entries and documents which could be made available as the result of all of these procedures. See *supra*, p. 6.

In sum, the plan submitted by petitioner was no substitute for compliance and numerous considerations required its rejection.

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[14] See Jones, *International Judicial Assistance* (1953), 62 Yale L. J. 515, 529.

CONCLUSION

It was fully within the discretion of the district court to implement, by the remedy of dismissal, a valid discovery order which has now remained outstanding and unsatisfied for more than eight years. No question is presented warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1957

APPENDIX

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*:

* * * * *

SECTION 9

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which

he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

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